The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 34 (2006) Article 14

R. v. Henry: Self-Incrimination and Self-Reflection in the Supreme Court

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Mr. Justice Gary Trotter[*]

I. INTRODUCTION

The Supreme Court's work in 2005 saw few ground-breaking pronouncements in criminal law. Most of the Court's decisions involved the application of settled law, without the application of the Charter.[1] A notable exception was the Court's decision in *R. v. Henry*,[2] in which the Court took the opportunity to look back on 20 years of its own jurisprudence interpreting the protection against self-incrimination in section 13 of the Charter. In the process, it took the "rare" step of reconsidering a number of its previous decisions in the area. The result is a very different right against self-incrimination, one that is unwed to any single theoretical approach to the right.

More profoundly, the Court in *Henry* signals a more flexible approach to the precedential value of *obiter dicta* remarks in its own decisions. In the British Columbia Court of Appeal,[3] two judges expressed concern about certain views expressed in *obiter dicta* by Arbour J.'s majority reasons in *R. v. Noël*.[4] The Supreme Court in *Henry* points in a new direction as to how *obiter* remarks should be approached by the lower courts.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See Ian R. Smith and Gary T. Trotter, "Developments in Criminal Law: The 2004-2005 Term" (2005) 30 S.C.L.R. (2d) 207, at 207.

[2] [2005] S.C.J. No. 76, 202 C.C.C. (3d) 449.

[3] [2003] B.C.J. No. 2068, 179 C.C.C. (3d) 207 (C.A.).

[4] [2002] S.C.J. No. 68, 5 C.R. (6th) 1.

II. Protection Against Self-Incrimination: Searching for a Principle

Protection against self-incrimination is found in section 13 of the Charter, which provides:

> 13. A *witness* who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate *that witness in any other proceedings*, except in a prosecution for perjury or for the giving of contradictory evidence. (emphasis added)

Compared to some sections of the Charter, section 13 is drafted somewhat awkwardly, particularly in terms of the use of tense. Perhaps this is unavoidable because the section attempts to regulate the relationship between two separate events — the impact of testimony given at one proceeding being used at a subsequent proceeding.

The availability of other legal rights in the Charter is conditioned by qualifiers such as "everyone",[5] "on arrest or detention",[6] a person "charged with an offence".[7] Section 13 is unique in that it purports to provide protection to "a witness". However, it will be apparent from the discussion below that the protection is now only afforded to an accused person who was previously a non-accused witness who was compelled to testify in other proceedings.[8]

Section 13 has proven difficult to interpret because of its relationship with other Charter rights, such as sections 7 (fundamental justice), 11(*c*) (the right not to be compelled to be a witness against oneself) and 11(*d*) (the presumption of innocence). Moreover, section 13 was created against a rich history of a common law privilege against self-incrimination, and the statutory response to that privilege in section 5(2) of the *Canada Evidence Act*.[9] In light of all of these considerations, it is not surprising that section 13 has presented challenges for the courts.

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5 For example, see s. 7 (fundamental justice), s. 8 (unreasonable search or seizure), s. 9 (arbitrary detention) and s. 12 (cruel and unusual treatment or punishment).

6 See s. 10(*a*), (*b*), (*c*).

7 See s. 11(*a*) to (*i*).

8 There are various ways that a person may be compelled to participate in a criminal trial. See Part XXII (Procuring Attendance) of the *Criminal Code*, R.S.C. 1985, c. C-46. However, these formal aspects of testimonial compulsion appear to play no role in this part of the law.

9 R.S.C. 1985, c. C-5. See David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005), Chapter 8 — Self-Incrimination.

1. *R. v. Dubois*

The seminal case on section 13 of the Charter is *R. v. Dubois*.[10] Dubois was charged with second degree murder. At his first trial, he testified in his own defence. He admitted the *actus reus* of the offence, but asserted that he was justified in killing the victim on the basis of self-defence. Dubois was convicted. He successfully appealed to the Court of Appeal and a new trial was ordered. At Dubois' second trial, as part of its case in chief, the Crown filed approximately 60 pages of the accused's testimony from his first trial. Dubois did not testify at his second trial and was convicted. His appeal to the Alberta Court of Appeal was dismissed.[11]

A majority of the Supreme Court of Canada allowed the accused's appeal. The differences between the majority and minority judgments reflect two different approaches to section 13. Writing for the majority, Lamer J. (as he then was) (Dickson C.J., Estey, Chouinard, Wilson and LeDain JJ., concurring) held that section 13 of the Charter must be viewed in light of section 11(*c*) and 11(*d*) of the Charter. Justice Lamer held that the protection in section 13, in conjunction with section 11(*c*) and 11(*d*), form the basis of the "case to meet principle" whereby the burden is placed on the prosecution to prove its case beyond a reasonable doubt and that the accused need not be called upon to answer until a case has been made out against him.[12] As Lamer J. held:

> Hence, the purpose of s. 13, when the section is viewed in the context of s. 11(*c*) and (*d*), is to protect individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly that which s. 11(*c*) prohibits. It guarantees the right not to have a person's previous testimony used to incriminate him or her in other proceedings.[13]

A number of conclusions follow from this conceptualization of section 13 of the Charter. First, the protection does not arise at the point in time when the person gives the testimony in question (*i.e.*, at a prior

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[10] [1985] S.C.J. No. 69, 22 C.C.C. (3d) 513.

[11] [1984] A.J. No. 820, 11 C.C.C. (3d) 453 (C.A.).

[12] *Supra*, note 10, at 531. The "case to meet" principle appears to have stemmed from the writings of Professor Ed Ratushny. For example, see Ed Ratushny, *Self-incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979). In *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, 89 C.C.C. (3d) 289, Lamer C.J. further expanded on the "case to meet" principle in the context of a Crown request to amend an indictment mid-trial.

[13] *Id.*, at 532.

proceeding); instead, it is triggered when an attempt is made to use the prior testimony to incriminate the witness at a subsequent proceeding.[14] Moreover, the Court held that the issue of whether the testimony is incriminatory should be evaluated at the second stage of the proceedings, when an attempt is made to use the evidence against an accused person.[15]

Second, and importantly for the purposes of this paper, Lamer J. held that the protection in section 13 of the Charter applies whether or not the witness testified voluntarily or under compulsion in the previous proceedings:

> Moreover, given the nature and purpose of the right, which is essentially protection against self-incrimination, the issue of whether the testimony was compulsory or voluntary at the moment it was given is *largely irrelevant*. The focus of the right is on the second proceedings, the time at which the previous testimony is sought to be used, rather than the time at which it is given.
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> For these reasons, s. 13, in my view, applies as much to testimony voluntarily given by an accused as to testimony given by a witness under compulsion.[16] (emphasis added)

Lack of compulsion in terms of the accused's prior testimony is consistent with the "case to meet" approach to the right. As discussed below, it is not consistent with the competing approach to self-incrimination.

Lastly, the majority in *Dubois* held that a re-trial on the same indictment satisfied the requirement of "other proceedings" in section 13 of the Charter. As Lamer J. held:

> To allow the prosecution to use, as part of its case, the accused's previous testimony would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by s. 11(*c*), *i.e*., to compel the accused to testify. It would also permit an indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty by the prosecution, as guaranteed by s. 11(*d*) of the Charter.[17]

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[14] *Id*., at 534. This was a live issue in the case because Mr. Dubois' first trial was held prior to the Charter coming into force, whereas his second trial occurred after.

[15] *Id*., at 536-37.

[16] *Id*., at 534.

[17] *Id*., at 537-38.

The majority found that Dubois' rights under section 13 of the Charter had been violated by the Crown's use of his testimony at his previous trial. A new trial was ordered.

In a separate opinion, McIntyre J. dissented. His decision turned on his conclusion that a re-trial was not an "other proceeding" within the meaning of section 13 of the Charter. Justice McIntyre approached section 13 from a very different perspective than the majority and interpreted the provision by comparing it with the operation of section 5(2) of the *Canada Evidence Act*.[18] He noted that, in many ways, section 13 of the Charter vindicates the same values protected by section 5(2), by encouraging truthful testimony from a person in exchange for protection against subsequent use against the person giving the testimony.[19] As McIntyre J. explained:

> There is a social interest in encouraging people to come forward to give evidence, not only in court but on other occasions in the tribunals and proceedings referred to above. That interest is not served where witnesses in testifying expose themselves to the danger of self-incrimination because of such testimony. It is suggested that it was a recognition of this fact, together with a recognition of the inadequacy of the law relating to self-incrimination and the inadequacy of provincial powers in this respect that caused the framers of the Charter to include the very greatly strengthened Charter provisions relating to self-incrimination.[20]

This conception of protection against self-incrimination as a bargain or a contract has been referred to as the *quid pro quo* approach.[21] Unlike the "case to meet" approach, this view of self-incrimination assigns significance to the question of whether the accused testified voluntarily at the first proceeding. As the theory goes, when the accused person testifies of his or her own accord, there is nothing to be compensated for by the state. In essence, there is no bargain to be made because the accused has sacrificed nothing. This may be gleaned from McIntyre J.'s view that Dubois' rights under section 11(*c*) were not violated when the

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[18] *Id*., at 537-38. R.S.C. 1970, c. E-10.

[19] *Id*., at 521-22.

[20] *Id*., at 526-27.

[21] This expression appears to have been coined by Fish J.A. (as he then was) in *R. v. Noël*, [2001] J.Q. no 2831, 156 C.C.C. (3d) 56 (C.A.), affd [2002] S.C.J. No. 68, 168 C.C.C. (3d) 193, discussed below.

Crown adduced his prior testimony as part of its case in chief because Dubois testified voluntarily at his first trial.[22]

2. *R. v. Mannion*

Dubois was applied in *R. v. Mannion*.[23] Mannion was charged with rape and was convicted at the conclusion of his first trial. Mannion testified at his first trial. A new trial was ordered by the Court of Appeal. At his second trial, Mannion was cross-examined on a portion of his testimony from his first trial. Specifically, he was cross-examined on his previous testimony on the issue of the circumstances under which he left town before being arrested. Mannion was convicted at his second trial and his appeal to the Court of Appeal was dismissed.[24]

Justice McIntyre wrote the unanimous decision of the Supreme Court. Accepting the majority holding in *Dubois* that a re-trial on the same indictment is an "other proceeding" for the purposes of section 13, McIntyre J. held that the cross-examination of the accused on his previous testimony was barred by the application of section 13, since the purpose of the cross-examination was to incriminate the accused. Justice McIntyre concluded:

> It is clear then that the purpose of the cross-examination, which revealed the inconsistent statements, was to incriminate the respondent. This evidence was relied upon by the Crown to establish the guilt of the accused. It is therefore my view that s. 13 of the Charter clearly applies to exclude the incriminating use of the evidence of these contradictory statements.[25]

Justice McIntyre observed that the accused could have received the same protection had he invoked the protection of section 5(2) of the

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[22] See *supra*, note 10, at 527, where McIntyre J. said:

> Section 11(*c*) gives the accused the right not to be compelled to be a witness in proceedings against himself in respect of the offence. There is not in this case any compulsion involved. The appellant gave evidence voluntarily at his trial and on the basis of that evidence obtained a new trial. I do not accept the suggestion that appears in the judgment of Kerans J.A. that he was only technically a voluntary witness. He had a fully guaranteed right to silence. He was represented by counsel and he gave evidence. The provisions of s. 11(*c*) are not engaged in these circumstances where no compulsion existed. The Crown is merely invoking the well-settled rule of evidence that past statements made by a party are ordinarily receivable in evidence against him …

[23] [1986] S.C.J. No. 53, 28 C.C.C. (3d) 544.

[24] [1984] A.J. No. 987, 11 C.C.C. (3d) 503 (C.A.).

[25] *Supra*, note 23, at 551.

Canada Evidence Act. Anxious not to interpret section 13 of the Charter so as to provide less protection than section 5(2), McIntyre J. held that section 13 applied.[26]

3. *R. v. Kuldip*

In *R. v. Kuldip*[27] the accused was charged with failing to stop at the scene of an accident, contrary to section 233(2) of the *Criminal Code*.[28] The accused testified at his first trial and was convicted. A new trial was ordered at which the accused also testified. However, at the second trial, the accused testified to different details concerning his attempts to report the accident to the police. The Crown purported to undermine the accused's credibility with use of his prior testimony. The Court of Appeal allowed the accused's appeal,[29] holding that *Mannion* afforded no exception based on the intended use of the previous testimony (incrimination *vs*. credibility). This was based, in part, on the fact that the statutory protection provided in section 5(2) of the *Canada Evidence Act*[30] recognized no such distinction.

Writing for the majority, Lamer C.J. recognized the distinction between cross-examination intended to incriminate and cross-examination for the purposes of attacking credibility. He concluded:

> Using a prior inconsistent statement from a former proceeding during cross-examination in order to impugn the credibility of an accused does not, in my view, incriminate that accused person. The previous statement is not tendered as evidence to establish the proof of its contents, but rather is tendered for the purpose of unveiling a contradiction between what the accused is saying now, and what he or she has said on a previous occasion.[31]

In making this distinction, Lamer C.J. acknowledged that the distinction between incrimination and credibility might be a difficult one for a jury

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[26] *Id*. Note that in *R. v. Kuldip*, [1990] S.C.J. No. 126, 1 C.R. (4th) 285, Lamer C.J. rejected the notion that s. 13 ought to always result in greater protection for the accused person. At 305, he said: "The *Charter* aims to guarantee that individuals benefit from a minimum standard of fundamental rights. If Parliament chooses to grant protection over and above that which is enshrined in our *Charter*, it is always at liberty to do so."

[27] *Id*.

[28] R.S.C. 1985, c. C-46.

[29] [1988] O.J. No. 40, 40 C.C.C. (3d) 11 (C.A.).

[30] R.S.C. 1985, c. C-5.

[31] *Supra*, note 26, at 302.

to make. However, he relied on the ability of trial judges to provide juries with proper limiting instructions, "reminiscent of those which are routinely given with respect to the use to which an accused's criminal record may be put".[32]

In deciding *Kuldip*, the majority took a very straightforward approach to section 13 of the Charter and, in the process, seems to have subtly shifted emphasis in favour of the *quid pro quo* approach to the section 13 protection, rather than Lamer C.J.'s preferred "case to meet" analysis in *Dubois*. As Lamer C.J. said:

> An accused has the right to remain silent during his or her trial. However, if an accused chooses to take the stand, that accused is implicitly vouching for his or her credibility. Such an accused, like any other witness, has therefore opened the door to having the trustworthiness of his/her evidence challenged. An interpretation of s. 13 which insulates such an accused from having previous inconsistent statements put to him/her on cross-examination where the only purpose of doing so is to challenge that accused's credibility, would, in my view, "stack the deck" too highly in favour of the accused.[33]

In a judgment simply agreeing with the Court of Appeal, Wilson J. (La Forest and L'Heureux-Dubé JJ. concurring) dissented.

4. *R. v. Noël*

R. v. Noël[34] introduced new variables into the analysis. Noël was a non-accused witness in a previous proceeding. As the Court's subsequent decision in *Henry* makes clear, this becomes a critical factor. Also, unlike in the Court's previous cases dealing with section 13, Noël invoked the protection of section 5(2) of the *Canada Evidence Act* when he testified in the previous proceeding.

Noël and his brother were alleged to have been involved in the killing of a nine-year-old boy. For reasons never explained, the accused and his brother were tried separately. The accused had made a number of incriminating statements to the police and then testified for the Crown at his brother's trial. The Crown was permitted to cross-examine

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32 *Id.*, at 303.
33 *Id.*, at 303.
34 *Supra*, note 4.

the accused, who eventually admitted that his statements to the police were true and that he had been an accomplice in killing the young boy. Noël's brother was acquitted. At his own trial, Noël disavowed his previous statements to the police and his earlier testimony at his brother's trial. He was cross-examined at great length on his previous testimony.[35] Noël was convicted. His appeal to the Quebec Court of Appeal was dismissed.[36]

Writing for the majority, Arbour J. (McLachlin C.J., Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.) had no difficulty in concluding that section 13 of the Charter had been infringed. Invoking an interpretation closely aligned with the purposes of section 5(2) of the *Canada Evidence Act*, Arbour J. held:

> Section 13 reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. called a *quid pro quo*: when a witness is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against the witness in exchange for his or her full and frank testimony.[37]

Further expounding on the *quid pro quo*, Arbour J. said:

> The witness, now accused, gave something in exchange for the protection. This is what makes a statement given in a judicial proceeding different from a statement to a person in authority, which is governed by rules of admissibility that are relevant to the special concerns related to that type of statement, and also different from all other out-of-court declarations and admissions.[38]

Based on this conception of the protection afforded under section 5(2) of the *Canada Evidence Act* and section 13 of the Charter, the majority refused to recognize a distinction between evidence given under compulsion and evidence given voluntarily. In both circumstances, Arbour J. held, once a witness takes the stand, he or she is required to answer all questions asked. As Arbour J. said: "The bargain is engaged when the jeopardy arises. The protection is given in exchange for the

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35 *Id.*, at 16.
36 [2001] J.Q. No. 2831, 156 C.C.C. (3d) 17 (C.A.).
37 *Supra*, note 4, at 25.
38 *Id.*, at 25.

answer."[39] However, Arbour J. held that the bargain only extends to uses of that evidence designed to "incriminate" the accused. As Arbour J. explained, *Kuldip* seemed to accept that the bargain did not extend to protection against the use of prior testimony designed only to challenge the credibility of the witness. She held that the distinction recognized in *Kuldip* fades away when the permitted use of the prior testimony and the impermissible use become totally intermingled and "when it is apparent that the prohibited use is of much greater value to the Crown and probably of irresistible appeal to the jury".[40]

The majority in *Noël* was further concerned with the nature of the evidence given at the prior proceeding. In *Dubois*, the Court had rejected the notion that it was necessary to determine whether or not the prior testimony was incriminating. However, this became crucial in *Noël* because cross-examination on prior testimony that was on its face incriminating, made the limited use of cross-examination for the purposes of testing credibility only more implausible to maintain.[41] Moreover, the majority pointed out that when the protection of section 5(2) of the *Canada Evidence Act* is requested, as it was by Noël, it applies to *any* use in a subsequent proceeding, whether as part of the Crown's case in-chief or for the purposes of cross-examination. Justice Arbour held that the trial judge should have prevented the Crown from engaging in any cross-examination of Noël based on this statutory protection alone.[42]

After engaging in a probing comparative examination of section 13 of the Charter and section 5 of the *Canada Evidence Act*, Arbour J. emerged with an important distinction, based on the characterization of the evidence given in the prior proceeding:

> In the result, when the evidence given in a judicial proceeding by a witness who subsequently becomes an accused was incriminating at the time it was given, such that the witness could have been granted the statutory protection of s. 5 of the *Canada Evidence Act*, but did not know to ask, the focus should shift to the use that the Crown proposes to make of that evidence at the subsequent trial of the accused. Clearly, as in *Dubois*, *supra*, the Crown is precluded from introducing it as part of its case in chief. *Whether the Crown can confront the*

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39 *Id.*, at 26.

40 *Id.*, at 27.

41 *Id.*, at 27. See also *R. v. B. (W.D.)*, [1987] S.J. No. 631, 38 C.C.C. (3d) 12 (C.A.).

42 *Id.*, at 29.

> *accused with his prior incriminating testimony in cross-examination, purportedly to test credibility, will depend on whether there is a real danger, despite any warning given to the jury, that the protected evidence may be used to incriminate the accused*. This is so in part because of the *quid pro quo*. There should be no risk attached to being compelled to give incriminating evidence, save to answer to perjury or similar charges.
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> If the prior testimony of the accused was innocuous at the time it was given, it is unlikely that it will serve to incriminate him when it is subsequently used to challenge his credibility. In such a case, as per *Kuldip*, *supra*, the cross-examination should be permitted. If the original evidence was not incriminating, the *quid pro quo* was never engaged, and the witness cannot ask of the state that he be prevented from being cross-examined as to his credibility should he assert matters differently in a subsequent proceeding, even if the ultimate effect of that subsequent cross-examination may be adverse to his interest. This is consistent with the language of s. 13 which grants to every witness the right not to have any "incriminating evidence so given used to incriminate that witness in any other proceedings. (italics added; underlining in the original)[43]

The majority easily found that there was a real danger that the jury would use Noël's prior incriminating testimony for incriminatory purposes at his own trial. Justice Arbour was also confident that no jury instruction, however skillful, could eliminate this danger.[44]

It is clear that the most important distinction made by Arbour J. in *Noël* was the difference between an accused who had previously testified voluntarily at his or her own previous trial, and an accused who was previously compelled to be a witness at someone else's trial. However, there are a few portions of her judgment where this distinction is blurred. In particular, Arbour J. said:

> It then becomes apparent that in keeping with the *quid pro quo* which lies at the heart of s. 13, the state should not be permitted to introduce as part of its case an incriminating statement made by the accused in another proceeding, *even if that* "*other proceeding*" *was his previous trial for the same offence* (see *Dubois*, *supra*); nor should the state be permitted to introduce, in cross-examination, for the purpose of

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43 *Id.*, at 33.

44 *Id.*, at 36.

> "incriminating" the accused, an innocuous statement that the accused made while a witness in another proceeding.[45]

In a lengthy dissent, L'Heureux-Dubé J. held that the cross-examination of Noël was proper and based on the correct interpretation of *Kuldip*. She accused the majority of reversing important aspects of *Kuldip*, including the holding that cross-examination on credibility is no longer permitted under both section 5 of the *Canada Evidence Act* and section 13 of the Charter.[46] Justice L'Heureux-Dubé expressed great faith in the ability of jurors to carry out the sometimes difficult and subtle tasks they are asked to undertake. Indeed, she held that, in the absence of evidence suggesting otherwise, the long-standing faith of the courts in the abilities of jurors should be preserved. She held that "evidence that the jury as an institution is fundamentally incapable of properly using this evidence is needed before such a sweeping change should be made."[47] Moreover, L'Heureux-Dubé J. suggested that Arbour J.'s conception of the *quid pro quo* embodied in section 5 of the *Canada Evidence Act* and section 13 of the Charter was a significant and unwarranted distortion, asserting that: "With respect, no principled system of justice, and indeed no criminal system concerned with ascertaining the truth, would ever agree to enter into such an arrangement."[48]

Noël was applied by the Court in *R. v. Allen*.[49] However, there was no real discussion of section 13 in that case.

5. Conclusion: Confusion

Twenty years of experience with section 13 of the Charter has given rise to inconsistency and dubious distinctions.[50] It is no longer clear what underlying principle anchors section 13. Since *Mannion*, the Court has struggled with the distinction between use of prior testimony for incrimination as opposed to credibility. Recognizing its problematic

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45 *Id*., at para. 25. See also paras. 4, 54 and 59.

46 *Id*., at 63.

47 *Id*., at 48. In making this assertion, L'Heureux-Dubé J. relied very heavily on the judgment of Dickson C.J. in *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670.

48 *Id*., at 61.

49 [2003] S.C.J. No. 16, 172 C.C.C. (3d) 449.

50 See Hamish Stewart & Erica Bussey, "The Privilege Against Self-Incrimination: Too Strong, Too Weak or Both?" (2005) 9 Can. Crim. L. Rev. 369.

nature, the *Noël* Court sought to provide greater protection by creating what turns out to be an unworkable standard. Moreover, because of *obiter dicta* remarks in *Noël*, the fundamental question of whether section 13 applies to a re-trial situation is left up in the air.[51]

III. *R. v. Henry* and the Importance of Compulsion

In addition to confusion, some courts have bristled against the implications of *Noël*, especially the prospect of an accused person testifying in one way at his or her first trial, and then giving completely contradictory evidence at a re-trial, with no consequences other than a possible prosecution for perjury or for giving contradictory evidence. This set the stage for the issue to return once again to the Supreme Court of Canada in *R. v. Henry*.

Henry and Riley were charged with first degree murder. Both testified at what turned out to be their first trials. Both relied upon the defence of intoxication. They were convicted, but their convictions were overturned on appeal. At the re-trial, both accused testified again, but Henry claimed to have been so intoxicated that he had virtually no memory of the events. Riley resiled from the defence of intoxication, and pointed the finger at Henry as being responsible for the victim's death. The Crown was permitted to cross-examine both accused on their prior testimony, leading to a conviction of both. Again, they appealed their convictions, relying on *R. v. Noël* to support their position that cross-examination was improper in the circumstances.

Their appeals were dismissed by a majority of the British Columbia Court of Appeal.[52] Justices Southin and Newbury held that there were various passages in the opinion of Arbour J. that suggested that the law articulated in that case applied to the situation of an accused who testified at a re-trial inconsistent with his or her evidence at the first trial.[53] Justice Southin said that, if the *obiter* in *Noël* were authoritative, it would lead to the creation of a new constitutionally protected right: "the right to swear falsely in one's own defence or, to put it another way, a right to give the jury one story at one's first trial and if, from

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[51] See Hamish Stewart, "*Henry* in the Supreme Court of Canada: Re-orienting the s. 13 Right Against Self-Incrimination" (2005) 34 C.R. (6th) 112.

[52] [2003] B.C.J. No. 2068, 179 C.C.C. (3d) 307 (C.A.).

[53] *Supra*, note 4, at para. 25.

some judicial misstep, one gets a new trial, to abandon the story which the first jury had rejected and try something different on the second jury."[54]

Writing for the entire Court, Binnie J. engaged in a thorough review of the Court's section 13 jurisprudence, from *Dubois* to *Noël*. In artful understatement, he concluded:

> Clearly there has not been consistent adherence to the underlying purpose of s. 13, namely "to protect individuals from being directly compelled to incriminate themselves."[55]

Along the way to reaching this conclusion, he observed that, in *Dubois*, the Court asserted that the protection was not predicated on whether the accused testified voluntarily or under compulsion in the prior proceeding.[56] The *Mannion* Court was silent on the matter. In *Kuldip*, the Court implicitly recognized the importance of compulsion. In his review of the Court's previous decisions, Binnie J. was also keenly aware of the artificiality of jurors and judges keeping separate the incriminating and credibility-related value of prior testimony.[57]

Justice Binnie considered the *Noël* Court's emphasis on the presence of compulsion as a pre-condition to the operation of section 13 protection. As Binnie J. held:

> It must be recognized that a witness who was also the accused at the first trial is at *both* trials a voluntary rather than a compelled witness, and therefore does not offer the same *quid pro quo*. (The notion that an accused who volunteers testimony can simultaneously object to answering questions whose answers may tend to incriminate him or her is a difficult concept. The whole point of volunteering testimony is to respond to the prosecution's case. Even answer to his or her own counsel's questions may tend to incriminate).[58]

It is clear that the *Henry* Court was attracted to the compulsion/ voluntary dichotomy as a triggering mechanism for section 13. However, there were two obstacles to making this the unifying concept

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[54] *Supra*, note 52, at 350-51. Justice Southin also said (at 351): "In that context, I use the word 'right' to mean that which one can do with impunity or with so little consequence as makes no matter. A possible charge under s. 136 of the *Criminal Code* is of trivial consequence to a man charged with first degree murder."

[55] *Supra*, note 2, at 467 (emphasis in the original).

[56] *Id.*, at 463.

[57] *Id.*, at 465-66.

[58] *Id.*, at 465.

of section 13 protection. First, the Court's own cases tended to lean in the opposite direction. Second, and as observed by Southin and Newbury JJ.A. in the British Columbia Court of Appeal, *obiter dicta* in the majority reasons in *Noël* cast doubt on the centrality of compulsion. However, both obstacles were overcome.

1. Precedent

As for precedent, the focus on voluntariness seemed quite sensible given the Court's gravitation to the *quid pro quo* theory of section 13 of the Charter. However, over the years, various members of the Court had expressed the view that it did not matter. After *Noël*, it clearly did, although Binnie J. wished to make this change without disturbing the holding in *Dubois* that prohibited the Crown from using prior, non-compelled testimony as part of its case in chief.

The Court refused to reconsider *Dubois*, holding that, when a new trial is ordered, an accused person has the choice not to testify at all. As Binnie J. explained:

> Thus, to allow the Crown simply to file the testimony of the accused given at the prior trial (now overturned) would permit the Crown indirectly to compel the accused to testify at the retrial where s. 11(c) of the *Charter* would not permit such compelled self-incrimination directly.
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> *Dubois*, to repeat, was an attempt to compel testimony. The result was correct and we should decline the invitation to revisit it.[59]

Effectively reverting to the "case to meet" principle, Binnie J. found that such a procedure would be tantamount to a section 11(*c*) violation.[60]

The Court took a different view of *Mannion*. Justice Binnie observed that, in that case, there was no attempt to compel testimony as there was in *Dubois*. Instead, the accused testified voluntarily at the prior proceeding and decided to testify again on the re-trial. Justice Binnie found the *quid pro quo* missing from the equation, thereby undermining the purposes of the application of section 13 of the Charter. Reflecting on the experience of the Court since *Dubois* and *Mannion* were decided, Binnie J. observed that failing to keep the underlying

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[59] *Id*., at 467.

[60] Given that the factual scenario in *Dubois* does not fit neatly into the wording of s. 13 of the Charter, this type of violation is probably classified under s. 7.

purpose of section 13 of the Charter clearly in sight has created unworkable distinctions in the law. Accordingly, Binnie J. concluded that:

> In my respectful view, notwithstanding the strong Court that decided *Mannion* and the cases that followed it, we should hold that s. 13 is *not* available to an accused who chooses to testify at his or her retrial on the same indictment.[61]

The Court decided that there were compelling reasons to justify one of its "rare" departures from its precedents. The prime reason offered for departing from *Mannion* was that the Court in that case failed to adhere to the underlying purposes of section 13 of the Charter articulated in *Dubois*. Second, Binnie J. held that, over time, the distinction drawn between impeachment of credibility and incrimination had proven unworkable. Justice Binnie essentially held that Arbour J.'s attempts in *Noël* to address this problem made matters worse.[62]

Justice Binnie concluded that maintaining earlier distinctions where voluntariness was considered irrelevant led to unfairness to persons who were compelled to testify in previous proceedings because they were placed on the same footing as those who testified voluntarily. He concluded:

> Accused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection "from being indirectly compelled to incriminate themselves" in any relevant sense of the word, and s. 13 protection should not be available to them.[63]

Of course, this sweeping passage was sufficient to do away with *Mannion* and *Kuldip*, especially since *Kuldip* was an extension of the Court's holding in *Mannion*. Consequently, the Court also eradicated the distinction between credibility and incrimination such that, "[i]f the contradiction reasonably gives rise to an inference of guilt, s. 13 of the *Charter* does not preclude the trier of fact from drawing the common sense inference."[64]

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[61] *Id.*, at 468. Of course, this broad statement is subject to the significant qualification provided by upholding *Dubois*.

[62] *Id.*, at 469-70.

[63] *Id.*, at 470-71.

[64] *Id.*, at 471.

While the Court's decision in *Noël* was largely consumed with the problem of improper use of prior testimony for incriminatory purposes, a distinction eradicated after *Henry*, the *Henry* Court left *Noël* intact as it applied to the factual scenario in that case. This was largely based on the analysis of section 5(2) of the *Canada Evidence Act*. However, Binnie J. went further and held that when testimony is truly compelled, as it was in *Noël*, under section 13 as under section 5(2), it must be treated as inadmissible for any purpose.[65] In short, where an accused testifies at his or her own prior trial, the previous testimony can be used in cross-examination for any purpose at the re-trial. When the accused testifies as a witness at someone else's trial, the testimony may not be used for any purpose. Everything now turns on the issue of voluntariness.

2. *Obiter Dicta*

To reach this result, it was also necessary for the Court to address the *obiter* comments of Arbour J. in *Noël*. As noted above, in parts of her judgment, Arbour J. leaves the impression that the protection afforded to someone in Mr. Noël's circumstances also applies to a person who testifies at his or her own first trial, and then again at a re-trial.

Justice Binnie engaged in an interesting analysis of distinguishing between the binding *ratio decidendi* of a judgment and that properly considered to be merely non-binding *obiter*. This task is complicated, especially given the realities of the Court's institutional role that, according to section 40 of the *Supreme Court Act*,[66] is focused more on questions of public importance. The Court's work is more concerned with principle, rather than error correction.[67] The demarcation line between binding and non-binding aspects of Supreme Court judgments is less tidy in the constitutional realm, where the Court attempts to develop analytical frameworks that, while not strictly essential for the disposition of a case, are intended to be binding on lower courts.[68] However, Binnie J. indicated that the principle that emerged from *R. v.*

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65 *Id*., at 471-72.

66 R.S.C. 1985, c. S-26.

67 See Bertha Wilson, "Decision-making in the Supreme Court" (1986) 36 U.T.L.J. 227.

68 *Supra*, note 2, at 473. As an example, Binnie J. refers to the s. 1 analysis in *R. v. Oakes*, [1986] S.C.J. No. 7, 24 C.C.C. (3d) 321.

Sellars,[69] whereby lower courts are bound by considered rulings on points of law not strictly necessary to the conclusion, ought now to be "disavowed".[70]

While the lower courts are now released from the strictures of *Sellars*, it is still unclear as to what is binding and what is not. As Binnie J. writes:

> The weight decreases as one moves away from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense that the *Sellars* principle in its most exaggerated form would have it.[71]

This approach is designed to foster growth and creativity in the development of the common law.[72]

Applied to *Noël*, Binnie J. refused to isolate Arbour J.'s comments as problematic. Instead, and in more sweeping terms, he held that, to the extent that statements in other cases are "inconsistent with the rationale of compulsion" (the "*quid pro quo*"), they should no longer be regarded as authoritative.[73] Justice Binnie essentially agreed with the comments of members of the British Columbia Court of Appeal in *Henry* that parts of the Court's comments in *Noël* were plainly wrong.

IV. THE FUTURE OF SELF-INCRIMINATION

The Court in *Henry* has reconfigured the law of self-incrimination in a way that makes it more rational. Despite the fact that *Henry* has resulted in the constriction of section 13 protection, initial reactions to the case

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69 [1980] S.C.J. No. 9, [1980] 1 S.C.R. 527.

70 *Supra*, note 2, at 473. The Court effectively disavowed the so-called *Sellars* principle in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, 118 C.C.C. (3d) 193.

71 *Id.*, at 475.

72 See Don Stuart, "Annotation to *Regina v. Henry"* (2006) 33 C.R. (6th) 215.

73 *Supra*, note 2, at 476.

have been positive.[74] Still, the law has been developed into a very complicated state,[75] with a couple of questions left lingering.

1. Compulsion

The critical distinction in Binnie J's reasons in *Henry* is the voluntary *vs.* non-voluntary nature of the prior testimony. Yet, the Court does not elaborate on the concept of voluntariness to any great degree. The protection applies only when the accused testifies at a prior proceeding as a witness at someone else's trial, whether or not he or she testifies pursuant to a *subpoena*. This approach is completely consistent with the *quid pro quo* approach to self-incrimination. However, it engages voluntariness in only the most formal sense. There may well be a qualitative difference between the accused who is forced to testify for the Crown at the trial of another, and the accused who decides (without a *subpoena*) to testify for the defence at the trial of the same person. Should the person in the latter situation be afforded the protection of section 13? Moreover, this conception of testimonial voluntariness simplifies the apparent "choice" of an accused person to testify at his or her trial. Professors Paciocco and Stuesser distinguish between "tactical" and legal compulsion.[76] As the authors posit, "accused persons may come to feel that they have no choice but to testify because of the strength of the evidence against them."[77] Yet, *Henry* only recognizes legal compulsion, despite how difficult the choice faced by an accused person may be.[78]

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[74] See Stewart, *supra*, note 51, at 112 and Stuart, *supra*, note 72.

[75] It was necessary for Professor Stewart to include an Appendix (Effect of *Henry* on Previous Decisions) to his article to properly explain the law.

[76] David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin, 2005), at 283-84.

[77] *Id.*, at 283. Moreover, in the case of multiple accused trials, if one accused decides to testify, and places the blame on the other(s), an accused may be faced with an agonizing choice as to whether to testify.

[78] Paciocco & Stuesser, *id*., point to *R. v. Darrach*, [2000] S.C.J. No. 46, 148 C.C.C. (3d) 97 as an example of the Court restricting compulsion for the purposes of s. 7 or 11(*c*) to legal compulsion, and not compulsion born of circumstances involved in attempting to defend the case.

2. Credibility and the Role of the Jury

Justice Binnie's eradication of the *Kuldip/Mannion* distinction between cross-examination for the purposes of incrimination and cross-examination going to credibility is welcome. It was a much-criticized aspect of the Court's section 13 jurisprudence.[79] However, the implications of this aspect of *Henry* may be more far-reaching. The Court's decision to allow multiple uses of prior testimony is rooted in its adherence to the *quid pro quo* theory of self-incrimination. If there is no compulsion, then there is no reason to subject subsequent use to credibility alone. Of course, this raises the question of why the Court did not also accept the invitation to reconsider its holding in *Dubois*. *Dubois* does not fit nicely into the post-*Henry* world of section 13.[80] Professor Hamish Stewart argues that, given the focus on the compelled nature of the prior testimony, "it is hard to understand how *Dubois* can remain good law."[81] This is because it is not really a section 13 case. As Binnie J. points out, filing the testimony from a previous trial as part of the Crown's case in-chief effectively permits compelled testimony, contrary to section 11(*c*) of the Charter. It is not section 13 that prohibits this use of prior testimony. It is a creative interpretation of section 11(*c*) that achieves this result.

Beyond the theoretical reasons for eradicating the distinction between different uses of prior testimony, there was another, very practical reason that motivated the Court in *Henry*. One of the accepted "truths" of Canadian criminal law is the ability of jurors to follow subtle instructions as to permissible and impermissible uses of certain types of evidence. The use of an accused person's criminal record is probably the most commonly cited example.[82] Indeed, this example was relied upon by L'Heureux-Dubé J. in *Noël* to argue against the majority's attempt to tighten up the dubious distinction drawn by the majority in *Kuldip*. Is

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[79] See M. Naeem Rauf, "Section 13 of the Charter and the Use of an Accused's Prior Testimony: A Reply to David Doherty and Ronald Delisle" (1991) 4 C.R. (4th) 42. At 47 and 48, Mr. Rauf suggested that the distinction is "artificial in the extreme" and "unrealistic". He further comments at 48: "You cannot successfully challenge an accused person's credibility without at the same time, and in a real sense, incriminating him." See also Don Stuart, *Charter Justice and Canadian Criminal Law*, 4th ed. (Scarborough, Ont.: Carswell, 2005), at 467-68.

[80] See Stewart & Bussey, *supra*, note 50, who argue that the reasoning in *Dubois* is unpersuasive because Dubois was not compelled to testify at his first trial, thereby making the subsequent use of the testimony as "compelled" dubious.

[81] See Stewart, *supra*, note 51, at 112.

[82] See *R. v. Corbett*, *supra*, note 47.

the Court's new stance in *Henry* to be taken as recognition that we cannot rely on the ability of jurors to make these subtle distinctions? What of our dependence on jurors' abilities to disabuse their minds of pre-trial publicity or the efficacy of all sorts of other limiting instructions, such as those related to similar fact evidence, bad character evidence and statements of co-accused? Our faith in the institution of trial by jury has long necessitated that we cling to beliefs in these special powers of jurors. But social scientists have long been telling us that our faith is misplaced.[83] Is the Court in *Henry* starting to question its own faith on this issue? Given that the eradication of the distinction between the two uses of evidence was primarily driven by theoretical concerns, it is probably best to be cautious in gauging the implications of this aspect of the Court's decision.

V. CONCLUSION

The Court's unanimous judgment in *Henry* is important for many reasons. First and foremost, for its re-orientation of the law of self-incrimination in section 13 of the Charter. Despite the questions that still linger after *Henry*, we are left with a more sensible account of a difficult provision of the Charter. As Southin J. of the British Columbia Court of Appeal recognized in *Henry*, we work in an era in which appellate courts order re-trials with great regularity.[84] For the criminal justice system to maintain credibility in striking the fine balance between rights protection in pursuit of its truth-seeking goal, the decision in *Noël* could not stand. The sensible approach in *Henry* tends to achieve this balance a bit better, such that an accused person cannot now tell one story at his or her first trial, and then another at the re-trial, all with complete impunity.

Henry also sheds light on the self-reflective qualities of the Supreme Court of Canada. It would have been easy for the Court to have declined the invitation to re-calibrate the law of self-incrimination, given that *Noël* had not been long decided. While striking a defensive chord at times, and apparently being unable to come out and plainly say "we were wrong," *Henry* is a heartening example of a dynamic Court, responsive to legitimate concerns expressed about its previous decisions.

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[83] For an excellent review of the social science learning on the ability of jurors to comprehend instructions on criminal records, see Owen M. Rees, "The Jury's Propensity for Prohibited Reasoning: *Corbett* Re-visited" (2002) 7 Can. Crim. L. Rev. 333.

[84] *Supra*, note 52, at 349.